IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 22, 2008

KEVIN DEWITT FORD v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
Nos. 2001-A-600, -601 Cheryl A. Blackburn, Judge

No. M2007-01727-CCA-R3-PC - Filed March 5, 2009

The petitioner, Kevin Dewitt Ford, appeals the Davidson County Criminal Court's denial of his petition for post-conviction relief from his convictions on seven counts of aggravated robbery. The petitioner pled guilty to these offenses and received an effective sentence of fifty years in the Department of Correction. On appeal, the petitioner argues that he received the ineffective assistance of counsel. After reviewing the record, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

Thomas F. Bloom, Nashville, Tennessee (on appeal); Kevin Dewitt Ford, Nashville, Tennessee, pro se (at evidentiary hearing); Dumaka Shabazz, Nashville, Tennessee, standby counsel for the appellant (at evidentiary hearing).

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Brett Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The record reflects that in December 2000, the petitioner and another man, Clifford Wright, who were the subjects of an investigation by the Metropolitan Nashville Police Department, were arrested in connection with "a nearly year-long spree of aggravated robberies." State v. Kevin Dewitt Ford and Clifford Sylvester Wright, No. M2003-00957-CCA-R3-CD, 2005 WL 677280, at *1 (Tenn. Crim. App. Mar. 23, 2005); reh'g denied, (Tenn. Crim. App. Apr. 11, 2005); perm. app. denied, (Tenn. Oct. 24, 2005). The police also executed "six search warrants . . . for premises associated with [the petitioner and Wright]." Id. After the petitioner and Wright were arrested, the police interviewed them, during which time they "implicated themselves in a series of aggravated

robberies." Id. The petitioner and Wright were subsequently indicted as co-defendants on numerous charges.[1] The grand jury first indicted the petitioner on two counts of theft of property and two counts of aggravated robbery. The grand jury later returned a second indictment; in the later true bill, the grand jury indicted the petitioner on forty-one counts of aggravated robbery, seventeen counts of theft of property, and two counts of aggravated assault.

The petitioner and Wright, who were represented by separate counsel, "filed motions to suppress their statements, alleging the illegality of their arrests, the lack of probable cause underlying the search warrants, and the coercive atmosphere surrounding the confessions." Id. at *2. The trial court denied the motion. Id. The petitioner filed a motion to reconsider the ruling, which was also denied. The petitioner and Wright then entered guilty pleas, with the petitioner pleading guilty to seven counts of aggravated robbery and receiving a total effective sentence of fifty years. Id. As a condition of their pleas, the petitioner and Wright reserved the right to raise certified questions of law regarding the trial court's ruling on their motions to suppress. Id. On direct appeal, this court affirmed the trial court's ruling, concluding that the petitioner's arrest, the police search of his business, and his statements to police did not offend his rights under the Fifth and Sixth Amendments. Id. at **3-14.

In July 2006, the petitioner filed a pro se petition for post-conviction relief. The petition challenged the legality of the petitioner's arrest and asserted that the petitioner received the ineffective assistance of counsel. In August 2006, the petitioner filed an amended petition in which he expanded upon his arguments challenging his arrest. The petitioner also filed two motions to have the trial judge who presided over the petitioner's suppression hearing and guilty plea recused from the post-conviction proceedings; the post-conviction court granted the second motion. The petitioner also filed a motion for self-representation and the appointment of standby counsel; the post-conviction court granted this motion. At a November 2006 status hearing, the post-conviction court ruled that the petitioner's issues regarding the legality of his arrest had been previously determined on direct appeal and therefore the only issue that the petitioner could address at the evidentiary hearing was ineffective assistance of counsel. The post-conviction court conducted the evidentiary hearing on April 11, 2007.

At the evidentiary hearing, the petitioner testified that shortly after his family retained counsel in September 2001, he and counsel "had numerous discussions saying that the arrest was unlawful, [and] the statement was unlawful. . . ." Accordingly, he and counsel prepared to file a motion to suppress the petitioner's statement to police and have the indictments against him dismissed. The petitioner said that he identified several potential witnesses for counsel to call at the suppression hearing, including members of his family, an assistant district attorney, a judicial commissioner, and a general sessions court judge. The petitioner explained that he wanted counsel to call the judicial witnesses because "the warrants didn't have a date or a time [or] the judge's signature" on them. He

[1] Wright is not party to these post-conviction proceedings.

also said that he "did not fit the description of the number one person they were looking for" and that the warrants "lacked probable cause." However, counsel declined to call any of these witnesses, insisting that he could attack the validity of the warrants through the testimony of police officers. When the post-conviction court asked the petitioner if counsel "ever explain[ed] . . . that you can't ask judges to talk about their judicial decisions," the petitioner replied that counsel did not so inform him.

Regarding the other proposed witnesses, the petitioner said that he wanted to call the assistant district attorney because the ADA "was over there to assist in aiding and abetting to make me believe I was arrested for robbery" when in fact he had been arrested for theft of property. The petitioner testified that he wanted his sister, Karen Carlton, to testify that she had "repeatedly called the robbery division and booking to find out my whereabouts. And they kept telling her repeatedly, we don't have him down here, you might be mistaken . . . ." When the trial court asked why the petitioner wanted to call his sister when it was undisputed that he was held in police custody for "about eleven hours" before being questioned, the petitioner said that his sister would have established that "[t]hey were trying to find out my whereabouts so they could get me counsel or somebody. I was not even allowed to use the telephone to call anyone." The petitioner said that he wanted Robin Simmons to testify because the police "basically told her what had happened with me and I was arrested for robbery," a statement which was indicative that the police "concocted a plan not to just get me into custody to talk to me . . . about the theft of property but the robbery." He also wanted Sheila Collier, who he said was present at his business when he was arrested, to testify that the police "entered the shop without . . . leaving a search warrant."

The petitioner said that he wanted to go to trial, noting, "I don't feel that a person could actually look at all the violations collectively as a whole and say that the police did nothing wrong." However, the petitioner said that counsel talked him into taking a plea. The petitioner said that counsel insisted that once the jury saw his videotaped confession, they would convict him. The petitioner said that he and counsel discussed the possibility of a bench trial, but there was no conversation regarding a jury trial. The petitioner said that he remembered little about the hearing at which he entered his guilty plea, saying that counsel "had already told me they're going to ask me this and you just agree to this and we can go to the appeal courts and get the ball rolling and we can get what we want that way."

In addition to failing to call witnesses and investigate the facts of the case, the petitioner alleged that counsel was defective because "we didn't even receive exculpatory evidence. . . . We received regular discovery, but we didn't receive anything to . . . actually know what the State[] [had]. We didn't receive a bill of particulars." He also said that after the trial court denied the petitioner's motion to suppress, he wanted counsel to file an interlocutory appeal. However, counsel said that he "didn't have time" to file the appeal and instead filed a motion to reconsider, which was denied. The petitioner also asserted that counsel should have moved for a mistrial during the hearing on the motion to reconsider after the assistant district attorney said "that this was a plan concocted,

that they didn't have substantial proof to arrest [the petitioner] for these robberies."

On cross-examination, the petitioner said that he confessed to committing several armed robberies because "that's what [the police] told me I needed to do." He said that counsel did not tell him that he would be unable to challenge the validity of the confession or the arrest warrant at trial. The petitioner said that counsel told him that these issues could be challenged on appeal if he pled guilty; however, the petitioner said that counsel did not tell him about "the negative side of what could happen if the Court of Criminal Appeals did not rule in [his] favor."

On redirect examination, the petitioner testified that the police knew that he could not have stolen certain vehicles he was alleged to have stolen "because they had a twenty-four hour, seven day a week surveillance on me." He also said that had counsel interviewed crime scene witnesses, "[w]e could have possibly got[ten] information . . . that I didn't fit the description of the person in the search warrant." Specifically, the petitioner said that the suspect's description as listed in the warrant was "between 5'2" and 5'6", 150 [pounds] and chubby," and he asserted that he had "never been chubby."

Karen Song, formerly Karen Carlton, testified that she was the petitioner's sister. She said that on December 5, 2000, Robin Simmons, the petitioner's then-girlfriend, informed her that the petitioner had been arrested. Song said that she then called the police department, who informed her that they did not have the petitioner in custody. She then called central booking, who said that the petitioner was not in custody and suggested that he call the police department's robbery division. She said that she called the robbery division, but the person who answered the phone there said that the petitioner was not in custody. Song said that she made her first call to police between 12:00 and 12:30 p.m., and she made her last call between 3:00 and 4:00 p.m. Song said that the next day, one of her sisters told her that the petitioner was in custody. Song said that she had never known the petitioner to be chubby or fat.

Robin Simmons, the petitioner's fiancée, testified that on December 5, 2000, police officers arrived at her apartment and began photographing vehicles outside her residence. She said that officers then "proceeded to knock on my apartment door and identify[] themselves and sa[y] that they had taken Kevin Ford downtown for armed robbery." The police then entered the apartment and asked her if she had any loose change. Like Song, Simmons said that she had never known the petitioner to be chubby or fat. On questioning by the trial court, Simmons said that the police seized three vehicles from outside her apartment: a Cadillac, a van, and a Mitsubishi minivan. She said that she did not sign a search warrant and that the police were "actually looking for change."

Counsel, called as a witness by the petitioner, who questioned him on direct examination, testified that he met with the petitioner ninety times between September 2001, when counsel was retained, and March 2003, when the petitioner entered his guilty plea. Counsel said that most of

these visits were "substantive" ones. Counsel said that he also met with the petitioner eleven times after he entered the custody of the Department of Correction. Counsel said that he and the petitioner went over the search warrants "many times," and that he (counsel) told the petitioner that while the copies of the search warrant provided during discovery were not signed or dated, "[t]he official copies were signed by the judge and dated and timed appropriately."

Counsel said that upon the petitioner's advice, in November 2001 he "had a telephone conversation with Ms. Collier about this search warrant issue," with counsel and Collier discussing several topics identified by the petitioner. Counsel asked Collier whether she recalled the name of a customer who was also present at the petitioner's place of business, a beauty shop, when the police arrived; Collier replied that she did not remember the person's name but that she would "check on it." According to counsel, the petitioner said that Collier would confirm that the police officers did not identify themselves upon their arrival; however, Collier told counsel that the officers did identify themselves. The petitioner told counsel that Collier would confirm that the petitioner was not advised of his rights when arrested, but Collier told counsel that "she didn't know that." The petitioner also told counsel that Collier would confirm that the police did not show the petitioner the search warrant, but Collier informed counsel that the police did show the petitioner the search warrant. Collier also told counsel that she signed the search warrant form. Counsel testified that "when [Collier] gave me those responses, we made the decision she would not be helpful to us in the suppression hearing."

Counsel testified that he did "all of the investigation that [the petitioner] and I felt was important to do given the posture of the case." He said that he and the petitioner "agreed that the issue in [the petitioner's] case was one of whether we could have success with the pretrial motions [to suppress]." Counsel added that "for us to go trial, have a jury trial and have the [petitioner's] confession played to the jury, would not have been a successful strategy for a jury trial." Counsel also insisted that he never told the petitioner that they would win on appeal and that the petitioner knew the risks involved in the appeal process.

Regarding the witnesses whom the petitioner alleged counsel failed to call, counsel testified that "[t]he witness that [the petitioner] wanted called was this Sheila Collier woman," but after his interview with her, counsel and the petitioner agreed not to call her. Regarding the proposed testimony of the petitioner's sister and fiancée, counsel said:

> We clearly established through the State's witnesses at the hearing on the motion to suppress . . . [that the petitioner was] held incommunicado for all of those hours at the police department. So there was no reason to call Karen to the witness stand to say that she tried to find out where [the petitioner was located]. That was not an issue. In fact, they basically admitted that they had concocted this scheme to charge [the petitioner] with theft of property warrants, make it appear as if [he was] being held on robbery warrants, and then extract that confession from [him]. Those were factual issues that we felt we effectively established through the State's proof.

Counsel testified that the assistant district attorney whom the petitioner wanted called "has a different recollection than [the petitioner] as to whether [they] ever had this discussion . . . about the federal Hobbs Act robbery statute, whether [the petitioner was] facing fifty one years." Counsel said that the ADA "did not recall ever saying any one of those things . . . [s]o there was no reason to advance him as a witness on the hearing on the motion to suppress." When asked why he did not subpoena the judicial commissioner and general sessions judge involved in the case, counsel said that he did not believe he could have called them to testify, and furthermore, he and the petitioner "never discussed in our preparation . . . the need to call any judicial officer. That was not the focus of what we were about when we were preparing for the motion to suppress."

Counsel testified that he told the petitioner that he could not file an interlocutory appeal of the trial court's order denying the motion to suppress and that "the best we could do would be a motion to reconsider . . . [a]nd I think [the petitioner was] very pleased with the filing that I did on the motion to reconsider." Regarding the plea agreement, counsel testified that he and the petitioner "knew that we really couldn't try this case, that once that two-hour confession tape was played to the jury that was very detailed, there would not be much to convince a jury of." Counsel said that he insisted that any plea agreement permit the petitioner to reserve a certified question of law pursuant to Rule 37 of the Tennessee Rules of Criminal Procedure. When the state proposed a plea agreement that did not include such an option, counsel and the petitioner rejected the offer. Counsel said that the assistant attorney general originally assigned to the case was unwilling to consider the Rule 37 option, but once that ADA left office and a new ADA took over the case, the petitioner, counsel, and the state were able to agree to a plea which permitted the petitioner to reserve a certified question of law regarding his arrest and confession.

Counsel testified that one of the police detectives gave inconsistent testimony during the suppression hearing. When asked why he did not call the officer to testify during the hearing on the petitioner's motion to reconsider, counsel testified that "we had developed a plan for the motion to reconsider, and that was to be done with oral argument. I don't ever remember any discussions . . . about wanting to recall" the detective in question. Counsel also said that he did not want to give the officer the chance to explain the inconsistencies in his testimony.

Counsel testified that the petitioner "never wanted to have a jury trial," and he denied that going to trial was a better option then pleading guilty. He reiterated that "if we had a jury trial and the jury saw [the] confession, it was likely" that the petitioner would have been convicted. Counsel also said that he did not tell the petitioner that "he had to plead guilty."

On July 16, 2007, the post-conviction court issued an order denying the petition for post-conviction relief. The petitioner subsequently filed a timely notice of appeal.

ANALYSIS

The burden of proof in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockart v. Fretwell, 506 U.S. 364, 368-372, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The Strickland standard has been applied to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). In the context of a guilty plea as in this case, the effective assistance of counsel is relevant only to the extent that it affects the voluntariness of the plea. Therefore, to satisfy the second prong of Strickland, the petitioner must show that "there is reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985); see also Walton v. State, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness or was "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability means a probability sufficient to undermine confidence in the outcome." Id. Failure to satisfy either prong results in the denial of relief. Id. at 697.

On appeal, the primary component of the petitioner's assertion that he received ineffective assistance of counsel was that counsel's strategy in defending the case—attacking the validity of the search warrant, the petitioner's arrest, and his confession, both via the motion to suppress and on

appeal—was doomed to fail. In support of this assertion, the petitioner argues that "[b]ecause of the law regarding pretextual arrests, the very minimal amount of proof needed to establish probable cause to arrest, and the damning, clear facts supporting the theft charges in this case, [counsel's] strategy had virtually no chance of success." The petitioner also argues that counsel was ineffective for failing to pursue a jury nullification defense. However, these arguments were not components of the petitioner's ineffective assistance of counsel assertion in the post-conviction court. As such, these issues are waived. "It has long been established in this jurisdiction that an accused may not litigate an issue on one ground, abandon that ground . . . and assert a new basis or ground for his contention in this Court." State v. Matthews, 805 S.W.2d 776, 781 (Tenn. Crim. App. 1990); see State v.Adler, 71 S.W.3d 299, 303 (Tenn. Crim. App. 2001); State v. Aucoin, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988).

Even were the issues not waived, the petitioner would not be entitled to relief. This court has held that a petitioner "is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy by his counsel, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings." See Adkins v. State, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). "[D]eference to tactical choices only applies if the choices are informed ones based upon adequate preparation." Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). In this case, the evidence reveals that counsel and the petitioner met extensively between the time counsel was retained and the conclusion of the petitioner's direct appeal, and that they thoroughly discussed their strategy for defending the case—a strategy which the petitioner endorsed throughout the trial court proceedings, on direct appeal, and in the post-conviction court. Accordingly, we conclude that the petitioner did not receive the ineffective assistance of counsel rendering his pleas involuntary.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

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D. KELLY THOMAS, JR., JUDGE